



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISC CIVIL APPLICATION NO. 242 OF 2018

SAMUEL NGUGI NJENGA.....APPLICANT

VERSUS

COASTAL KENYA ENTERPRISES LTD.....RESPONDENT

RULING

1. By a Motion on Notice dated 17th May, 2018, the applicant herein seeks leave to file an appeal out of time.
2. According to the applicant, the decision he seeks to appeal against was delivered on 7th June, 2017. After the said delivery, the Respondent filed an application seeking to set aside the proceedings which application was dismissed for non-attendance on 30th January, 2018. Subsequently, the respondent vide an application dated 8th February, 2018 sought to have the dismissed application reinstated which application was settled on 21st February, 2018.
3. It was the applicant's case that during the pendency of the said applications he was unable to file the appeal because of the uncertainty of the resultant decision therefrom.
4. It was averred by the applicant that he has a good appeal with high chances of success and that the delay was not deliberate but was beyond his control.
5. In opposing the application, it was contended by the respondent that the decision sought to be appealed against was delivered on the 7th June, 2017 pursuant to ex parte proceedings which were not brought to the attention of the respondent. In that suit the applicant obtained a decree and certificate of costs and proceeded to execute the warrants therefrom. When the respondent sought to set aside the proceedings, its application which was opposed by the applicant was dismissed for non-attendance on 30th January, 2018 and the respondent settled the decretal sum in full including the auctioneers' fees on 15th February, 2018 and closed the matter.
6. It was contended that the applicants who were represented by counsel knew that they had 30 days within which to appeal but which period they ignored. It was the respondent's position that the applicant's intention was to reap the benefits of the judgement then have a second bite to the respondent's detriment. It was therefore contended that the applicant is guilty of inordinate laches hence his application should be dismissed. In the respondent's view, from the attached memorandum of appeal, the intended appeal has no chances of success hence it is in the interest of justice that the application be dismissed on the principle that litigation must come to an end.
7. It was submitted on behalf of the applicant that the Applicant has satisfied the conditions necessary to grant extension of the time to file appeal out of time. According to the applicant, the general conditions which the applicant should meet before he can be granted leave to file appeal out of time are that the delay was not inordinate, that the delay is sufficiently explained, that the Respondent will not suffer any prejudice and that the intended appeal is arguable. In this regard the applicant relied on **Gitetu vs: Kenya Commercial Bank Limited (2009) KLR 549** and **Pothiwalla vs. Kidogo Basi Housing Co-operative Society Limited & 31 Others (2005) KLR.**
8. Regarding delay, it was the applicant's position that inordinate delay is one which is unreasonable. In this case the judgment sought to be appealed against was delivered on 7.6.2017 while this application was filed on 9.7.2018 nearly one year after the time to appeal had lapsed. However, this delay was entirely caused by the defendant/respondent who filed two applications seeking setting aside of both the proceedings and the judgment being appealed. The last application was eventually withdrawn by the defendant/respondent on 16.5.2018 after the time within which an appeal ought to have been filed had already lapsed. The instant application was thus filed merely two months after litigation had come to an end before the trial court. In the applicant's view, two (2) months cannot be termed as an inordinate delay. It shows that the Applicant has been vigilant to file his appeal on time and should therefore not be penalized by being denied leave to appeal out of time.

9. It was submitted that the delay in filing the intended appeal as explained in the grounds of the application and the supporting affidavit was caused by the prosecution of the Applications filed by the defendant/respondent herein. Based on the decision in **Muchungi Kiragu vs. Jmaes Muchungi Kiragu & Anor; Civil Appeal No. 356 of 1996 –Nairobi** it was submitted that this discretion like any other judicial discretion must be exercised judicially.

10. In the applicant's view, since the intended appeal is entirely on quantum, no one has sentimental attachment to money and as such and prejudice can be suffered by the Respondents. Any inconvenience which can be fall the respondents if this application is allowed can be adequately compensated by costs.

11. It was submitted that justice is a two edged sword and that the Respondent in his Replying Affidavit has not indicated that he will suffer any prejudice if this application is allowed hence it is in the interest of justice for this honourable court to allow this application.

12. Regarding the arguability of the intended appeal, it was submitted that the Applicant should try and demonstrate the appeal has merits. However, this is not a major factor in the preliminaries to be considered when deciding whether to allow a party to appeal out of time or not. The court at this stage should be concerned with whether the Applicant has met the conditions for granting leave to appeal out of time and should not go into the merits of the intended appeal. In this regard the applicant relied on **Gitetu vs. Kenya Commercial Bank Limited (2009) KLR 545** at page 550 where the court observed as follows:

“.....in the reference we ob icants Counsel that the learned judge went too far in his ruling...”

13. According to the applicant, though the Respondent in his Replying Affidavit argues the intended appeal is frivolous and the leave sought should be denied, it is too early to delve into the merits and demerits of the intended appeal.

14. The court was therefore urged to allow the application.

15. The respondent on his part submitted that the applications which were made by the respondent in the lower court cannot be termed as “reasons beyond the control of the applicant” since they have no bearing on the filing of an appeal against the judgement of the court. The court was invited to note that the applicant relentlessly pursued the execution till he was paid after which he decided to pursue an appeal. It was therefore submitted that there has been an inordinate delay. In this regard the respondent relied on **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65.**

16. It was submitted that though the applicant contends that he has a good appeal with high chances of success the nature of the intended appeal is not disclosed. In this regard the respondent relied on **Gerald M'limbine vs. Joseph Kangangi Meru Misc App. 40 of 2007.**

17. Since the applicant has been paid in full, it was submitted that reopening the case at this point will greatly prejudice the respondent who has since moved on.

Determination

18. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.

19. Section 79G of the ***Civil Procedure Act*** provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

20. It is however noteworthy that section 79G aforesaid employs the use of the phrase “an appeal may be admitted out of time” as opposed to “time may be extended to lodge an appeal out of time”. However, even in cases where the law uses the latter phraseology, it has been held that it is prudent to regularise the default before seeking to extend time. This was the position in **Mugo & Others vs. Wanjiru & Anor [1970] EA 482** where it was held that:

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

21. In this case however the law expressly provides that an appeal may be admitted out of time. That this is so was affirmed by **Emukule, J** in **Gerald M'limbine vs. Joseph Kangangi [2009] eKLR**, in which he expressed himself as follows:

“My understanding of the proviso to Section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process which

under Section 79B says.....”

22. It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court’s discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the applicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

23. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant. This was the position reiterated in **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR**, where the Court of Appeal set out the principles undergirding an Application for leave to file an appeal out of as follows:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others...”

24. Similarly, in **Leo Sila Mutiso vs. Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231** the Court of Appeal set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant. However, in the case of **Thuita Mwangi vs. Kenya Airways Ltd [2003] eKLR**, the Court explained that follows:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

25. However, as was held in **Kenya Commercial Bank Limited vs. Nicholas Ombija [2009] eKLR**:

“An “arguable” appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court.”

26. That was the position in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR** where the court held that:

“...On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous...”

27. In this case the Applicant contended that the delay in filing the appeal was due to the fact that there were pending applications filed by the respondent herein. One of the applications was seeking to set aside the ex parte judgement while the other application sought to reinstate the said application after it was dismissed. According to the applicant this was what constitutes factors beyond his control. From the affidavit in support of this application, judgement was delivered on 7th June, 2017. The application by the respondent was dated 19th October, 2017 more than three months after the delivery of the judgement. Even if we were to believe that it was prudent for the applicant to await the outcome of the said application, by the time the said application was filed the period limited for the filing of the appeal had long lapsed. There no reason at all given by the applicant why the appeal was not filed before the respondent filed its application. I associate myself with the decision of the Supreme Court in **Civil Application No. 3 of 2016 - County Executive of Kisumu –vs- County Government of Kisumu & 7 Others** at page 5 where the said Court said:-

“... 23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the NICHOLAS SALAT case to which all the parties herein have relied upon. The court delineated the following as:-

“the underlying principles that a court should consider in exercise of such discretion:

- 1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- 2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- 3) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- 4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
- 5) ...”

28. In the premises I find that the applicant has failed to explain the whole period for the delay which delay is clearly inordinate. This factor coupled with the fact that the decretal sum has been settled courtesy of the applicant’s move to execute the decree clearly militates against the reopening of the litigation.

29. In the premises I find no merit in this application which I hereby dismiss but with no order as to costs due con-compliance by the respondent with the directions of the court to furnish soft copies.

30. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 24th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Muumbi for Mr Musya for the Applicant

CA Geoffrey